IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

United States of America, Plaintiff, vs. Chris Sexton Baucum, Defendant.	CR 01 - 474 PHX SRB **DETENTION ORDER**

This matter arises on Defendant's Motion To Reopen Detention Hearing (doc. #96) which the trial judge referred to the undersigned for ruling. This Magistrate Judge previously ordered Defendant detained on the basis that he is a danger to the community. The Government opposes Defendant's motion on both procedural and substantive grounds. At the November 13, 2001 detention hearing witness Christine Pero-Newman testified and was cross examined, evidence was received and arguments were made. The matter was taken under advisement.

Title 18 U.S.C. §3142(f) expressly provides that a detention hearing may be reopened only:

> if the judicial officer finds that information exists that was not known to the movant at the time of the hearing and that has a material bearing on the issue whether there are conditions of release that will reasonably assure the appearance of such person as required and the safety of any other person and the community.

Thus, Defendant must establish: 1) that information now exists that was not known to Defendant at the time of the initial hearing, and 2) the new information is material to release

conditions regarding flight or dangerousness.[1] See, United States v. Hare, 873 F.2d 796 (5th Cir. 1989)(testimony of defendant's family and friends is not new evidence to warrant reopening of detention). The rationale for the rule is discussed in United States v. Flores, 856 F. Supp. 1400, 1406 (E. D. Cal. 1994) wherein the government's motion to reopen detention hearing was denied:

> There are very few proceedings in federal practice which encourage a party to be less than diligent in bringing forth all material evidence the first time a hearing is held. Generally, reconsideration of a decided matter based on the presentation of additional evidence requires good cause for the failure to present that evidence initially. See, e.g., Fed.R.Civ.P. 60(b); United States v. Oliver, 683 F.2d 224 (7th Cir.1982) (failure to exercise diligence in locating witnesses before criminal trial precludes new trial based on newly discovered evidence). A rule that would not discourage a party for failing to acquire readily available evidence for presentation the first time is a rule that encourages piecemeal presentations. Judicial efficiency is not served by such a practice.

To his credit, defense counsel candidly acknowledges that Defendant knew of the existence of Christine Pero-Newman[2] and information about which she testified at Defendant's second detention hearing. He argues, however, that Defendant gave this information to his former defense attorney, Alan Kyman, who represented Defendant at the first detention hearing[3] but Mr. Kyman refused to either proffer it or call Ms. Pero-Newman as a witness. Current defense counsel does not indicate why Mr. Kyman did not use this information. Defense counsel claims, without any evidence or witnesses other than Ms. Pero-Newman, that Mr. Kyman's failure to provide this crucial information on the issue of dangerousness constitutes ineffective assistance of counsel which justifies reopening the issue of detention.

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[1]The Government does not argue that Defendant's "new" information is not material to dangerousness.

[2]Her testimony disclosed that Defendant was then and is now her boyfriend, that she has known him for eight years and that they were together late in the evening on March 14, 2001 or early morning of March 15, 2001 when the information about Jason Wolfe was communicated to her by her girlfriend, Wanda Hoyt, and the Phoenix police.

[3]The first detention hearing was spread over three dates: June 27, 2001, June 29, 2001, and July 17, 2001.

Defense counsel has not provided the Court, nor has the Court's independent research disclosed, any case, either directly or by close analogy, which permits reopening a detention hearing on the basis of ineffective assistance of counsel. Nevertheless, it is axiomatic that the Sixth Amendment guarantees the assistance of counsel at every "critical" stage of a prosecution. United States v. Wade, 388 U.S. 218, 224 (1967); Powell v. Alabama, 287 U.S. 45, 47 (1932). No one can seriously contend that a detention hearing is not a critical stage of a prosecution where the liberty of a defendant hangs in the balance. Therefore, the Court assumes that ineffective assistance of counsel provides a constitutional basis for reopening the detention hearing.

The Sixth Amendment guarantees the right to **effective** assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "The benchmark for judging any claim for ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that [the proceeding] cannot be relied upon as having produced a just result." Id. at 686.

To establish ineffective assistance of counsel, Defendant must first demonstrate that counsel's performance was deficient by showing that counsel's performance fell below an objective standard of reasonableness. Id. at 687-88. To counteract the unfair influence of hindsight, judicial scrutiny of counsel's performance must be highly deferential, and a court must indulge a strong presumption that counsel's conduct falls within the range of reasonable professional assistance. Id. at 689. After establishing the deficiency of counsel's performance, Defendant must show that counsel's errors were so serious as to deprive him of a fair trial or hearing. Id. at 687. In other words, Defendant was prejudiced thereby. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct 366 (1985)(citing Strickland). While Defendant need not show that counsel's deficient conduct more likely than not altered the outcome of the case, Defendant must show that there is a reasonable probability that, but for counsel's deficient conduct, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. at 694; Brown v. Myers, 137 F.3d 1154, 1157 (9th Cir.1998). If Defendant cannot establish prejudice, the Court need not reach

the performance prong. Strickland, supra., at 694; Williams v. Calderon, 52 F.3d 1465, 1470 (9th Cir. 1995). Moreover, if Defendant fails to allege specific facts showing prejudice, the reasonableness of counsel's representation is inconsequential. Hill, supra. at 60.

Defendant claims that the failure to present Christine Pero-Newman's testimony was tantamount to ineffective assistance. Counsel's decision to call a particular witness at trial, or arguably at a detention hearing, generally falls within the realm of tactical choices to which courts defer. United States v. Chambers, 918 F.2d 1455, 1461 (9th Cir. 1990); Morris v. State of California, 966 F.2d 448, 456-57 (9th Cir. 1991). Here, Ms. Pero-Newman's testimony disclosed that she is Defendant's 8-year girlfriend, is currently incarcerated on State felony forgery convictions (crimes of dishonesty) and has previously been convicted of possession of stolen mail. She simply is not a credible witness. Clearly, Defendant has not overcome the presumption that former counsel's failure to call Ms. Newman as a witness or proffer her testimony at the first detention hearing was a sound tactical decision. United States v. Harden, 846 F.2d 1229, 1232 (9th Cir. 1988)(counsel's failure to call a witness who is subject to impeachment is not ineffective assistance). Moreover, as discussed below, Defendant fails to show any prejudice as a result of former counsel's failure to call Ms. Pero- Newman as a witness or proffer her testimony at the first detention hearing.

Secondly, if believed, Ms. Pero-Newman's testimony contradicts Defendant's wiretapped telephone conversation with Greg Surdukan that Defendant, along with Ms. Newman, were on their way to kill Jason Wolfe when a shootout fortuitously occurred between Wolfe and Phoenix police officers, resulting in Wolfe's death. Defendant is quoted as saying, "We were fixing to do the dirty deed (murder Wolfe) you know, they (the police) beat us to it by five minutes." Defendant told Greg Surdukan that after the shootout, Defendant laughed, jumped up and down, did the wave and gave the police the high five. At the time of the shootout, Defendant told Surdukan: "I already had the fucken (sic) dragon's breath (angry) and my shotgun and everything." Ms. Pero-Newman, however, testified that when she and Defendant left her house, they already knew the police had shot Wolfe, but did not know he had been killed. They intended to go to Wanda's house but they couldn't reach it because the police

had closed the area off because of the shooting. She denied knowledge that Defendant had a gun in his possession that night or, at least, claims she didn't see one. She further claimed that upon learning of Wolfe's death, Defendant didn't jump for joy, didn't do the wave and did not give the police the high five for killing Wolfe. She also denied knowledge of an arsenal of weapons at Defendant's residence.

Thirdly, if Ms. Pero-Newman's testimony is believed, which it is not, the Court must conclude that Defendant lied to fellow Hell's Angel Surdukan about Defendant's intent to kill Wolfe on the night police shot Wolfe. Regardless of whether it was false "macho" bragging, as defense counsel claims, it casts doubt, along with the Court's prior findings, on the reliability of Defendant's promises to comply with conditions of release that would ensure the safety of the community.

The Court **FINDS** that the "new" information presented by Ms. Pero-Newman was not newly discovered but was admittedly known by Defendant at the time of the first detention hearing and that Defendant has failed to show ineffective assistance of former counsel to warrant reopening Defendant's detention hearing. Thus, the Court will deny Defendant's Motion To Reopen on procedural grounds. Alternatively, the Court will address the merits of the subject motion.

The Court **FURTHER FINDS** that Ms. Pero-Newman is not a credible witness and that her testimony does not alter the Court's findings in its prior Order (doc. # 56) that the Government has proven by clear and convincing evidence[4] that Defendant is a danger to the community and that there does not exist any condition or combination of release conditions that would reasonably assure the safety of the community if Defendant were released.

Accordingly,

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[4]Defendant's current and long-term history of drug usage, his affiliation with the Hell's Angels Motorcycle Club, his prior felony conviction, his possession of an arsenal of high-powered weapons, his willingness, intent and possession of a shotgun to commit an unlawful killing of Jason Wolfe, his expressed joy and happiness with the police killing of another human being which demonstrate an utter disregard for the value of human life, and that the crimes charged carry a rebuttable presumption that Defendant is a danger to the community.

IT IS ORDERED that Defendant' Motion To Reopen Detention Hearing (doc. #96) is **DENIED**. Defendant shall remain detained until further order of the Court.

DATED this 15th day of November, 2001.

Lawrence O. Anderson
United States Magistrate Judge